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THE RISE OF *CONTRA LEGEM* AND *SINE LEGE* USAGES IN FRENCH COMMERCIAL LAW AND JURISPRUDENCE (XVIII^E-XIX^E SIÈCLES), SOME EXAMPLES.

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Studying the impact of usages or customs in the world of business reveals the strength, or indeed the weakness, of the link between law and economics. One example alone could almost illustrate this, if we simply recall the age-old; ineffectual censure of usury by any number of jurists and canon lawyers. Yet interest-bearing loans became legal reality during the French Revolution. Usury is a practice *contra legem* which has become law. Like it or not, this usage is fact: a practical and economic reality. In this, it follows the traditional pattern of creating behaviours.

However, the specificity of commercial usage is that it almost always concerns money. Consequently it has to a certain extent become victim to a kind of presumption of immorality, for the merchant and his commercial activities are traditionally tainted with suspicion: a reaction which is doubtless more marked in Catholic countries.

The tolerance and in particular the recognition of a usage in case law assumes in general and in principle that those who follow it keep within the limits of what they are entitled to do. Once you cross those limits, you enter into the realm of fraud. But there are cases where even fraud as defined by existing rules of law cannot prevent a usage from being followed, or prevent it from developing in such a way that the legislator is eventually forced to recognize its existence and incorporate it from then on into normative provisions.

The most common way of **recognizing / authorizing** a usage can be seen as positive. It can be found first of all in the opinions of the trial judge which indicate the existence of such and such a usage specific to a particular corporation, professional branch or type of activity. The

legislator may, on occasion, be obliged to draw conclusions from this, and confirm the existence of these usages in a legally-binding text.

But a usage can also be **revealed/recognized/sanctioned/authorized** negatively, that is by admissions of defeat on the part of the public authorities. Let me explain. The defeat is the inability of the authorities to regulate or outlaw a usage, as if a stone placed in the middle of a torrent would stop the current. The usage, propelled by the economic necessity from which it draws its strength, navigates its way around the obstacle, overcomes it and in certain cases, eliminates it.

The law's lack of power can clearly be reflected in the paucity of legislative measures. This was evidently the case **before**, as under the Ordinance of 1673, but also after, if you consider the obvious gaps in the 1807 Commercial Code. In this type of case where the law says nothing and makes no prohibitions, usages fill the empty space, *sine lege*.

There's a notable example of this in Old French Law when Colbert's Ordinance (1673) intervened to recognize and officially regulate the practice of sponsorships which had, until then, been treated as a mere usage.

However, the powerlessness of the law is most often revealed in a more **implicit** fashion. What about the silence of the royal legislator in this same ordinance, which required publication only of those companies made up of merchants and traders. Clearly, this measure did not concern sponsorships, which were usually composed of merchants and **non-merchants**. The unstated objective was to protect the reputation of the noblemen who were accustomed to investing as sponsors without wishing this to be known. Hypocritical capitulation of the law confronted with practice and faced with economic necessity.

[Second example] There's another flagrant example of the law capitulating when faced with the economic logic borne by usages. The decree of the King's Council of 14 July 1787 passed on to the Parliamentary Court (civil section) elements relating to the dispute over unlawful trade in company stock by private shares (prohibited by the Council decree of 1724). In so-doing, the Council divested itself of this dispute, for it no longer had the material means to deal with the problem. The practice of trade in securities, which alone guarantees the smooth flow of capitalism, forced the law to bend to the proof of material fact. The real

impossibility for justice to prevent such trade was evidence of the emergence of usages *contra legem*. This decision by the state power **reveals/recognizes/authorizes/sanctions** usage negatively, through a sort of resignation (I cannot regulate on this) and also somewhat positively, for it was jurisprudence that first indicated the existence of this practice. The usage ultimately prevailed after the collapse of the Ancien Régime, when the principle of stock-market dealing in the securities of companies was accepted.

[3rd example] Still on the same theme. The introduction of limited liability clauses in the great private companies of the 18th century, also *contra legem*, was bound to hold sway for obvious economic reasons. Thus, and highly significantly, the Gorneau project, followed by the Commercial Code of 1807, were to confirm the appearance in law of new types of companies which wouldn't be called public limited companies until the 1807 Code, and the principle of whose existence had been previously denied in law.

Economic growth was based on limiting liability, so the law was powerless to stop it. Consequently, in the two cases to which we have referred, the usage, based on the requirements of economic reality, ended up forcing itself upon the legislator at the end of a three-stage process. First, the powerless legislator condemns a practice and refers it to the judges. Secondly, jurisprudence assumes its role of revealing and even sanctioning the usage. Finally, the increasing number of cases forces the legislator to ratify what he cannot control, pushed into this position by economic reality. The law is powerless to curb an economic reality in any lasting fashion. The divorce between law and the economy always ends up with the economy winning, as illustrated by usages.

[4th example] The corporate interest clause is another illustration of a usage that the legislator, unable to counteract the economic need represented by this practice, was incapable of containing. We know that the interest clause was present in the so-called "privileged" or colonial trading companies, and this with the full blessing of the authorities. Its practice was justified by the length of time it took for any profits to emerge. In order to reassure the investors, it was necessary to offer them some remuneration **in advance of receiving the profits**. However, this money was taken from the company's share capital, which endangered the whole structure of the company itself. It is true that the state assumed the role of sponsor,

and guaranteed the operation. But with the legalization of purely private companies, notably public limited companies, in 1807, we can witness the Council of State progressively banning the use of these interest clauses which, by reducing the share capital, risked endangering the security guarantees the company's social capital was supposed to offer third-party investors. But while receiving pre-profit interest was gradually prohibited (with notable exceptions for the railway companies), the idea remained that it was still possible to remunerate shareholders with interest, on condition, however, that there were profits in advance, which was called the "first dividend" clause. After all, was it right to prohibit the free distribution of a share of the gains when the company was making a profit?

But in accepting this practice, the legislator was also accepting a conceptually challenging confusion of types between the company and the loan: two very distinct contracts, however, in their causes as well as their consequences. There again, economic necessity (that is, the motivation of investors attracted by receiving interest) prevailed over the will to rationalize and categorize which underlies all legal and regulatory frameworks.

The same can be said for the introduction (albeit measured) in 2011 in French law of « la fiducie » or the trust. This proves yet again that economic necessity can overturn the very foundations of French law, which had traditionally always defended the principle of the unity of heritage and rejected any notion of constituting a patrimony by appropriation. The manifest influence of comparative law on the introduction of the trust into our law is also worth underlining.

[5th example] Stock exchange transactions are highly indicative of the strength of usages, because of the fact, once again, that they force themselves upon the authorities, notwithstanding the various prohibitions that have been expressly emitted. We have seen that only authorised companys' securities could be traded (1724); usage killed off the ban and, after the Revolution, it became legal to trade in the securities of any listed company, whether authorized public limited companies or partnerships limited by shares. Only brokers were authorized to trade in company securities on the Stock Market. However, a clear shortage of brokers led to the emergence of unauthorized dealers who carried out the same operations as the brokers and were able to do so thanks to the tolerance of the government. From the legal

point of view, such tolerance was completely incomprehensible, particularly when you consider the « Jansenist » severity of the Napoleonic codes. However, in economic terms, it was absolutely necessary because of the feeble number of brokers. And what about the futures market, or short sales transactions? These have always been officially prohibited but practice and usages simply ignored the ban until 1885, when the legislator ended up conceding and authorising futures and short sales, despite the collapse of the General Union.

The 6th example we'll take is just as remarkable, but for slightly different reasons. It involves the silence of the law, and also demonstrates the incapacity of the civil law to adapt to economic demands, hence once again the need to make business law more independent.

Indeed, trading in business assets (created by Parisian practice in the 1780s) and the protection of creditors in respect of movable property are an example of a usage emerging *sine lege* this time. Normally, only immovable, real estate transfers were subject to mandatory disclosure under the Civil Code. Business assets, considered as movable property, were therefore not covered by the rules on disclosure. The business could consequently be transferred without the creditors being informed about it, denying them the possibility to challenge payment of the transfer sale price. That price could, in fact, have been reduced in order to protect a proportion of the bankrupt's assets from the aforementioned creditors. Parisian traders established the practice, however, of publicizing transfers even without being ordered to do so by the law, in order to guarantee the security of the transferor's creditors. This heralded the emergence of a system of self-protection in the field of commerce. We can clearly see here the incapacity of the Civil Code, still turned towards immovable property, to correspond to economic needs. Perhaps we have here the vestiges of that old medieval adage, *res mobilis res vilis* (a movable object is without value)? In any case, there was a lively debate. Some went so far as to assign an obligatory character to this usage, in the absence of any proof that it was *contra legem*. Others considered that, on the contrary, constituting a resale right in favour of creditors conflicted with the wording of Article 2279 of the Civil Code. Once again, case law had to assume the role of declaring the existence of the usage, which ended up becoming law.

To conclude:

There's also a very French characteristic in respect to the law of obligations which concerns the near absolutist primacy of Roman law before the Revolution and then of the Civil Code over all other sources of law. From 1804 onwards, civil usages were wiped out and commercial usages viewed with distrust, for the majority thinking was that these practices were *de facto* rather than *de jure*. Moreover, the "nationalization" of the law from the 17th century, and the idea that this should serve as the unchallengeable foundation of French law, contributed to the fracture between the law and the economy. Usages, which derived traditionally from « international » practices, were considered suspect in a period when France claimed to exert some sort of legal Magisterium both within and beyond its frontiers. If we sum up the common characteristics of commercial usage we find that 1°, it's a fact; 2°, it often comes from an international practice; 3° it brings into play questions related to money; 4° it is deployed by people of whom we are suspicious (see the 1807 Code). All these elements explain how it was sidelined as a source of law by French jurists who tended to consider the Civil Code as the French Civil Constitution. And even when the law did admit the use of custom and usages, it always accorded them a very subordinate role. While Article 1873 of the Code stated clearly that "the provisions in this Title apply to commercial companies only in respect of the points which do not contravene commercial laws **and usages**", article 18 of the Commercial Code went on to stipulate that "Company statutes are regulated by the civil law, by the laws specific to commerce, and by conventions between the parties." The pre-eminence of the civil law was obvious. Yet its philosophy was by no means the same. The Civil Code was made for the head of a family wanting to acquire some real estate, not for merchants subordinating property to trade. This led to a cruel lack of pragmatism. Drawing strength from its actuality, hard economic **fact** made light of all the philosophy; and the legislator bowed to its authority.